Office-Supreme Court, U.S.
FILED
MAY 8 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1542

SAUL CANTOR and MABEL CANTOR,

Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, a municipal corporation of New Jersey, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DAVID R. SIMON,
Attorney for Petitioners,
744 Broad Street,
Newark, New Jersey, 07102.

SIMON & ALLEN,
RICHARD B. GOLDSMITH,
NORMAN S. MASS,
Of Counsel to Petitioners.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ:	
I. The Imposition of the Costs of Educational Facilities Upon the Petitioners was a Denial of Equal Protection of the Law, and Constituted a Taking of Petitioners' Property Without Due Process of Law	8
II. The Zoning Ordinance Deprived Petitioners of the Reasonable Use of Their Property, Effecting an Unconstitutional Taking Without Due Process, and Amounted to Unconstitutional "Spot" Zoning	12
Conclusion	16
Appendix:	
A—*Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division (Filed November 10, 1969)	1a
B—Oral Opinion of the Superior Court of New Jersey, Law Division, rendered on July 26, 1968	3a

PAGE

C—Oral Opinion of the Superior Court of New Jersey, Law Division, rendered August 1, 1968 ..... 11a

D—Portion of Letter Opinion of Superior Court, Law Division, dated June 14, 1968 ..... 35a

E—Order of the Supreme Court of New Jersey Denying Petition for Certification 42a

F—Order of the Supreme Court of New Jersey Denying Motion for Reconsideration 43a

G—Excerpts from Zoning Ordinance of Township of Madison Adopted April 27, 1964 ..... 44a

Cases Cited

Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (Sup. Ct. 1964) 10

Boyd v. U.S., 116 U.S. 616 (1886) 11

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) 10

Daniels v. Borough of Point Pleasant, 23 N. J. 357, 129 A.2d 265 (1957) 9

Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S. 2d 729 (Sup. Ct. 1960), *affirmed* 15 A.D. 2d 815, 225 N.Y.S. 2d 538 (2d Dept. 1962) 10

Jenad, Inc. v. Village of Scarsdale, 23 A.D. 2d 784, 258 N.Y.S. 2d 777 (2d Dept. 1965), *reversed* 18 N.Y. 2d 78, 271 N.Y.S. 2d 955, 218 N.E. 2d 673 (1966) 10

PAGE

Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (Sup. Ct. 1965), *appeal dismissed* 385 U. S. 4 (1966) 10

Midtown Properties, Inc. v. Madison Township, 68 N. J. Super. 197, 172 A.2d 40 (Law Div. 1961), *affirmed o.b.* 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963) 7, 8

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 10, 11

Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963) 14

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 13

Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 207 A.2d 522 (1965) 15

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 13, 15

Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799 (Sup. Ct. 1961) 9, 10

Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938) 15

Rockhill v. Chesterfield Twp., 23 N.J. 117, 128 A.2d 473 (1957) 15

U. S. v. Causby, 328 U.S. 256 (1946) 13

United States v. Central Eureka Mining Company, 357 U.S. 155 (1958), *reh. denied* 358 U.S. 858 (1958) 13

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 13

PAGE

West Park Ave. Inc. v. Ocean Twp., 48 N.J. 122, 224 A.2d 1 (1966) 9

United States Constitution Cited

Fifth Amendment 2, 3, 10, 11

Fourteenth Amendment 2, 3, 10, 11, 14

Statutes Cited

N.J.S.A. 40:55-39 (d) 6

28 U.S.C.A. §1257(3) 2

Other Authority Cited

Annot., *Spot Zoning*, 51 A.L.R. 2d 263 (1957) 15

FILED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

SAUL CANTOR and MABEL CANTOR,

Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, a municipal corporation of New Jersey, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioners Saul Cantor and Mabel Cantor respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on November 10, 1969.

Opinions Below

The opinions of the Superior Court of New Jersey, Law Division, are unreported. The opinion of the Superior Court of New Jersey, Appellate Division, is also unreported. Certification was denied by the Supreme Court of New Jersey, and the Order denying certification is reported in 55 N. J. 316, 261 A. 2d 359 (1970). A petition for reconsideration was also denied by the Supreme Court of New Jersey, and the Order denying reconsideration is unreported.

Jurisdiction

The final judgment of the Superior Court of New Jersey, Appellate Division, was entered on November 10, 1969 (Appendix A). Further review of this case by way of petition for certification was denied by the Supreme Court of New Jersey on January 27, 1970 (Appendix E). A timely petition for reconsideration was also denied by the New Jersey Supreme Court on March 10, 1970 (Appendix F), and this petition for certiorari was filed within 90 days of that date. Petitioners invoke the jurisdiction of this Court under 28 U. S. C. A. § 1257(3).

Questions Presented

1. Whether exactions by municipal authorities of the costs of school facilities and off-site sewerage improvements deprived Petitioners of equal protection under the law and property without due process of law or without just compensation contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether a use restriction which renders land without a suitable use constitutes a taking of property without due process or without just compensation under the

FILE COPY

Fifth and Fourteenth Amendments of the United States Constitution.

Constitutional Provisions Involved

UNITED STATES CONSTITUTION—Fifth Amendment.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION—Fourteenth Amendment.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

Statute Involved

The pertinent portion of the Zoning Ordinance of the Township of Madison, adopted April 17, 1964, is set forth in Appendix G at pp. 44a-45a.

Statement of the Case

Petitioners, Saul Cantor and Mabel Cantor, are the successors in interest of a number of corporations which were engaged in land development and housing construction within the Township of Madison, New Jersey.

The facts relating to Petitioners' claim for the costs of school lands and buildings and an off-site sewerage line are briefly as follows. Petitioners were real estate developers and builders in Madison Township in the period from about 1955 to about 1966 (P84a-5, P255a-8 to 10).* In about 1955, Petitioners began to acquire land for their "Sayre Woods South" development, which is the subject of this case (P87a-4 to 5). A subdivision map was submitted to the Madison Township Planning Board in January 1956, and received preliminary approval on March 5, 1956 (P101a-11 to 13). Final approval was granted on December 20, 1956 (P1836a-11 to 13).

On January 1, 1957, a New Township Committee took office in Madison Township (P1721a-11 to 23). The new mayor, John Chamberlain, had previously expressed opposition to new housing developments and had, in fact, been elected on a platform of "controlled growth" (P1847a-10 to 13). Mayor Chamberlain testified that he was afraid that the community could not absorb new developments (P1723a-4 to 8), and that the taxpayers would not pay for the schools necessary to handle the school-age population of the developments.

The new Township Committee refused to recognize the final approval given Petitioners' plans on December 20,

---

* References herein are to 7 volumes of Appendix to Appellants' Brief, which constituted part of the record on appeal before the Superior Court of New Jersey, Appellate Division.

1956 (P1836a-5 to 7), and refused to issue building permits or to release signed subdivision maps for the development (P1841a-8 to 14). In an attempt to obtain the signed maps and the permits, Petitioners made numerous inquiries to Township officials (P122a-9 to 15). In the course of these inquiries, Petitioner Saul Cantor was told by a council member that the Township was interested in provision being made for schools within the subdivision, and that "there would be no large-scale builder that would come into the town unless they conformed to the ground rules that were laid down by the Board of Education" (P127a-12 to 16).

Cantor was also informed by Mayor Chamberlain that unless schools at no cost to the Township were included in the subdivision plans, there was only "the chance of a snowball in Hades of ever securing final approval" (P138a-9 to 14). Similar testimony was also given by Paul Goldman, who at the time was a partner with Petitioners in this development (e.g., P1545a-15 to 21). Although specific instances of gross intimidation were denied by certain of the Township officials who testified, their testimony left little doubt that subdivision approval was not given and building permits were not issued to any builder who did not agree to provide for schools in the Township, by way of "contributions" either of money or of the schools themselves.

Petitioners thereafter attended a number of meetings with the Township and the Board of Education (P151a-18 to P152a-25). Finally, more than a year later on May 18, 1958, when Petitioners could no longer afford to have their development at a standstill, they were forced to "agree" in writing to construct the schools and to convey the school sites and the schools to Madison Township (P2419a). A second "agreement" signed on April

21, 1958 with the Sewerage Authority required Petitioners to construct an off-site sewerage line for the Township (P2413a). Several months later, the first building permits were issued to Petitioners (P208a-2 to 4). The "Sayre Woods South" development was substantially completed in 1962, but Petitioners continued to build in the Township until about 1966.

The facts relating to Petitioners' claim for a use variance are briefly as follows. Petitioners sought two variances from the Zoning Board of Adjustment of the Township of Madison ("Board of Adjustment"). One application, concerning a lot located on the southwesterly corner of Throckmorton Lane and Route 9, was made pursuant to N.J.S.A. 40:55-39(d), and requested a "use" variance to construct a restaurant in a residential zone. The other application, concerning a parcel of land on Route 516, sought a "size" variance.

The Throckmorton Lane property, although zoned for residential use exclusively, is in a "complete business area", and is clearly unsuited to residential use. Completely insulated from any residential construction, it is a 100 x 100 foot lot surrounded by commercial structures. Petitioners applied for a building permit for the construction of a roadside restaurant. The building inspector of Madison Township refused to issue the permit on the grounds that the Township Zoning ordinance restricted the property to residential use.

The Board of Adustment denied the variance on the Throckmorton Lane property on February 11, 1966, immediately after the conclusion of the public hearing. The variance on the Route 516 property was also denied on the same date after a committee, appointed to examine the land involved, reported that it would "prefer the

property to stay the way it is at the present time—vacant" (SP70a-10 to 11).*

The questions herein concern the constitutional limitations on a municipality and its agencies in obtaining school buildings and land and sewerage improvements from a developer and in restricting the use of property within their territorial jurisdiction. These issues were timely and properly raised below in oral argument before the trial court and in the appellate briefs as a matter arising under the United States Constitution. This is also apparent from Petitioners' discussion of *Midtown Properties, Inc.* v. *Madison Township*, 68 N. J. Super. 197, 172 A. 2d 40 (Law Div. 1961), *affirmed o.b.* 78 N. J. Super. 471, 189 A. 2d 226 (App. Div. 1963), which speaks in classical constitutional terms.

Petitioners also challenged the constitutionality of the municipality's zoning ordinance in the record below (Appendix G), which zoned Petitioners' property for residential use exclusively, although such property was clearly only suitable for commercial use:

*"SP" references are to Supplemental Appendix for Plaintiffs-Appellants, which constituted part of the record on appeal before the Superior Court of New Jersey, Appellate Division.

Reasons for Granting the Writ

I.

The imposition of the costs of educational facilities upon the petitioners was a denial of equal protection of the law, and constituted a taking of petitioners' property without due process of law.

Substantial federal questions are raised by the exaction of favors and grants of property by a municipality from a land developer which deserve comprehensive review by this Court. The decisions below silently condone the coercive methods used by the Respondents to obtain improvements from the Petitioners. Under threat of withholding building permits, Petitioners were compelled to donate school lands and buildings without compensation in violation of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioners were also unconstitutionally compelled to construct an oversized off-site sewerage line without just compensation. Since the schools and sewerage line were for the benefit of the entire community, the imposition of these costs upon only a portion of the taxpayers amounted to a denial of equal protection of the law.

Each municipality has the responsibility of providing school facilities for its residents. A municipality may not require a builder to construct schools and convey schools and school lands as a condition of subdivision approval. As the Court stated in *Midtown Properties, Inc.* v. *Madison Twp.*, 68 N. J. Super. 197, 209-10, 182 A. 2d 40, 47 (Law Div. 1961), *affirmed o.b.* 78 N. J. Super. 471, 189 A. 2d 226 (App. Div. 1963):

"It is the duty of the municipality to educate our citizenry; to build schools, and equip and maintain them for such purposes. The cost for public education, in a democratic society, must be borne by the public and the funds to be used for such purpose must be raised by public taxation.

"Our courts have held that a municipality has no right to refuse to grant approval for a building project merely because its school system would be unable to absorb the increase of students; or that it would increase taxes. See *Township of Springfield* v. *Bensley*, 19 N. J. Super. 147, 158 (Ch. Div. 1952).

"It is my opinion that *any attempt to compel a developer to pay for building a school, or to donate land for a school, as a condition precedent to giving temporary or final approval to a subdivision is violative of his constitutional rights in that it is a taking of his property without due process of law and deprives him of equal protection of the law, and therefore is illegal and void.*" (Emphasis supplied.)

The New Jersey Supreme Court has held that the New Jersey legislature has not delegated to municipalities the right to make such demands for schools. *West Park Ave., Inc.* v. *Ocean Twp.*, 48 N. J. 122, 127, 224 A. 2d 1, 4 (1966); *Daniels* v. *Borough of Point Pleasant*, 23 N. J. 357, 362, 129 A. 2d 265, 267-268 (1957).

Exactions by municipalities as a precondition to land development have been the subject of litigation in many states. The decisions of a number of state courts conflict in principle as to the constitutionality of municipal exactions. See *Pioneer Trust and Savings Bank* v. *Vil-*

lage of Mount Prospect, 22 Ill. 2d 375, 176 N. E. 2d 799 (Sup. Ct. 1961); *Gulest Associates, Inc.* v. *Town of Newburgh,* 25 Misc. 2d 1004, 209 N. Y. S. 2d 729 (Sup. Ct. 1960); *affirmed* 15 A. D. 2d 815, 225 N. Y. S. 2d 538 (2d Dept. 1962); *Jenad, Inc.* v. *Village of Scarsdale,* 23 A. D. 2d 784, 258 N. Y. S. 2d 777 (2d Dept. 1965), *reversed* 18 N. Y. 2d 78, 271 N. Y. S. 2d 955, 218 N. E. 2d 673 (1966); *Jordan* v. *Village of Menomonee Falls,* 28 Wis. 2d 608, 137 N. W. 2d 442 (Sup. Ct. 1965), *appeal dismissed,* 385 U. S. 4 (1966); *Billings Properties, Inc.* v. *Yellowstone County,* 144 Mont. 25, 394 P. 2d 182 (Sup. Ct. 1964).

Exactions such as those obtained from Petitioners herein raise questions which relate to the tax structure of local government as well as to questions under the Fifth and Fourteenth Amendments of the Federal Constitution. These issues are of great public importance because they concern the methods by which local governments may constitutionally obtain funds for capital improvements and distribute the tax burden among their residents.

The right to compensation is an incident to the exercise of the power to take private property and the ascertainment of just compensation in each case is a judicial inquiry. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325, 327 (1893). The Fifth Amendment expressly requires the payment of just compensation when the federal government takes private property for public use, and the due process clause of the Fourteenth Amendment is interpreted to impose the same limitations upon the States. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226 (1897). The principle of just compensation for every taking "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the

public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Navigation Co.* v. *United States, supra,* 148 U. S. at p. 325.

By forcing Petitioners to assume the Township's lawful responsibility to provide schools, the Township and the Board of Education, at the expense of Petitioners, benefited every taxpayer in the Township whose general real estate tax rate would otherwise have been increased. Likewise, the costs of the off-site sewerage line were not apportioned fairly based upon the application of pre-existing standards. The result was confiscatory and arbitrary, imposing undue costs upon Petitioners to the benefit of the Township's general taxpayers. Petitioners were thereby deprived not only of property without due process of law, but also of equal protection of the laws in violation of the provisions of the Fifth and Fourteenth Amendments of the United States Constitution.

For these reasons, we respectfully submit that this case is peculiarly appropriate for determination by this Court. Without any constitutional restraints, municipalities are able to prohibit or burden real estate development by requiring payment or donations to fund the construction of schools, public buildings, parks and recreational facilities, or to maintain police or fire protection, or to provide funds for other local services. The courts of New Jersey erred in refusing to determine properly a substantial federal constitutional question which is of great public importance and which has never been, but which should be, fully considered and decided by this Court.

Singularly appropriate to the case herein is the following comment by Justice Bradley speaking for the Court in *Boyd* v. *U. S.,* 116 U. S. 616, 635 (1886):

> "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

II.

The zoning ordinance deprived petitioners of the reasonable use of their property, effecting an unconstitutional taking without due process, and amounted to unconstitutional "spot" zoning.

The Throckmorton Lane property, although zoned for residential use exclusively, is in a "complete business area", and is clearly unsuited to residential use. Petitioners applied for a building permit for the construction of a roadside restaurant. The building inspector of Madison Township refused to issue the permit on the ground that the Township zoning ordinance restricted the property to residential use. There followed the application for a variance which was denied.

The true character of the property was so apparent that the Board of Adjustment, in its brief and argument before the trial court, conceded that the land "is unsuitable for residents under present circumstances." The admission was noted, and accepted by the trial court (Appendix D, p. 39a). Nevertheless, residential development is the only use permitted under the applicable zoning ordinance of the Township. The basic infirmity of

the zoning ordinance, restricting as it does the land to a use for which it is completely unsuited, is at once apparent. Petitioners, in effect, own property for which *no* practical use is provided.

The issue as to whether a particular governmental restriction amounts to a constitutional taking turns upon the particular circumstances of each case. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416 (1922); *United States* v. *Central Eureka Mining Company,* 357 U. S. 155, 168 (1958), *reh. denied* 358 U. S. 858 (1958).

Government power to interfere by zoning regulation with the rights of a property owner by restricting the character of his use must bear a substantial relation to the public health, safety, morals or general welfare. *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (1926). This Court has recognized that if regulation goes too far, it may so diminish the value of property as to constitute a taking. *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U. S. at p. 415; *United States* v. *Central Eureka, supra,* 357 U. S. at p. 168. Moreover, this Court has defined "taking" in very broad terms. See *U. S.* v. *Causby,* 328 U. S. 256 (1946) (deprivation of use and enjoyment of land by low-flying military planes held to constitute a "taking").

In *Nectow* v. *City of Cambridge,* 277 U. S. 183 (1928), the facts are quite similar to the case at bar. There too, the plaintiff sought review of a zoning ordinance which placed his property in a residential district. The property in question was surrounded by either unrestricted property or property used commercially. The Court found that the land, as zoned, was of comparatively little value for the limited uses permitted by the ordinance. The Court noted that governmental powers to interfere by

zoning regulations with the general rights of a land owner by restricting the character of his use are not unlimited. The ordinance was held unconstitutional under the Fourteenth Amendment on the ground that the zoning of the plaintiff's land in a residential district was not indispensable to any general plan, and that such zoning of plaintiff's land did not promote the health, safety, convenience and general welfare of the local inhabitants.

The decisions in New Jersey have, without exception, held that such an ordinance is so restrictive as to amount to confiscation or a taking without just compensation, and is therefore unconstitutional and void. In *Morris County Land Improvement Co.* v. *Parsippany-Troy Hills Tp.*, 40 N. J. 539, 193 A. 2d 232 (1963), while striking down an ordinance which effectively restricted a landowner from utilizing his property, the Supreme Court of New Jersey stated (40 N. J. at p. 557, 193 A. 2d at p. 242):

> "As was said in *Kozesnik* v. *Montgomery Township*, 24 N. J. 154, 182 (1957): 'That a restraint against all use . . . is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion.' . . . The same result ordinarily follows where the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose *or when the only permitted uses are those to which the property is not adapted* or which are economically infeasible." (Emphasis supplied.)

The situation described in the *Morris County* case is clearly present here. The zoning ordinance here possesses the fatal defect noted in the *Morris County* decision, in that it permits only uses to which the land is not adapted. Thus, the zoning ordinance, insofar as it places the

BLEED THROUGH POOR COPY

Throckmorton Lane property in a residential zone, is unconstitutional and void.

Apart from its confiscatory nature, the ordinance unconstitutionally discriminates against Petitioners' property. Petitioners' land, while restricted to residential use, is surrounded on four sides by property not so restricted. No characteristics distinguish the surrounding property from that belonging to Petitioners, and no reason appears, or suggests itself, for restricting Petitioners' land in the light of the nature of the surrounding uses. Whether the contiguous non-residential uses are permitted by ordinance or by variance, or whether they exist as nonconforming uses, no clearer example of "spot zoning" may be found. See *Rockhill* v. *Chesterfield Twp.*, 23 N. J. 117, 126, 128 A. 2d 473, 478 (1957); Annot., *Spot Zoning*, 51 A. L. R. 2d 263, 311 (1957); *Reynolds* v. *Barrett*, 12 Cal. 2d 244, 83 P. 2d 29 (1938) (property may not be restricted to residential use if surrounded by non-residential uses); *Palisades Properties, Inc.* v. *Brunetti*, 44 N. J. 117, 134-135, 207 A. 2d 522, 533-534 (1965) (lack of comprehensive plan compels conclusion of unconstitutional spot zoning).

The only legal conclusion that can properly be drawn from the conceded facts is that the ordinance is arbitrary and unreasonable, and therefore unconstitutionally confiscatory. As Justice Holmes observed in *Pennsylvania Coal Co.* v. *Mahon*: "We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the charge." 260 U. S. at p. 416.

The question of when excessive zoning restrictions become an unconstitutional taking is of great public im-

portance which has not recently been, but which should be, fully considered and decided by this Court. We respectfully submit that the zoning ordinance of the Township of Madison is arbitrary and unreasonable and without substantial relation to public health, safety, morals or general welfare, and so deprives the property owner of productive or beneficial use of his property as to constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

David R. Simon,
Attorney for Petitioners.

Simon & Allen,
Richard B. Goldsmith,
Norman S. Mass,
Of Counsel to Petitioners.

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—November 10, 1969)

Argued November 3, 1969—Decided November 10, 1969.

Before Judges Goldmann, Lewis and Matthews.

On Appeal from the Superior Court, Law Division, Middlesex County.

Mr. David R. Simon argued the cause for appellants (Messrs. Simon & Allen, attorneys; Mr. Norman S. Mass, of counsel).

Mr. Richard F. Plechner argued the cause for respondent Zoning Board of Adjustment.

Mr. Marc J. Gordon argued the cause for respondents township and Mayor and Council.

Mr. Francis X. Journick argued the cause for intervenor-respondent Madison Township Sewerage Authority.

Mr. Alfred J. Hill argued the cause for intervenor-respondent Madison Township Board of Education.

PER CURIAM

The judgments here under appeal are affirmed for the reasons stated by Judge Schwartz in his oral opinion of July 26, 1968 with respect to intervenor Madison Township Sewerage Authority, in his oral opinion of August 1,

Appendix A

1968 (as corrected in minor respects by his letter of September 9, 1968) with respect to defendants Mayor and Council of Madison Township and intervenor Madison Towship Board of Education, and in his letter opinion of July 26, 1968 [*sic*] with respect to defendant Zoning Board of Adjustment of Madison Township.

APPENDIX B

Oral Opinion of the Superior Court of New Jersey, Law Division, Rendered on July 26, 1968

The Court [Hon. Abe S. Schwartz]: The action against the Madison Township Sewerage Authority is, as plaintiff's counsel state,—

Read what I have.

(Requested portion is read by the Reporter.)

The Court: —is unlawful on the basis of the West Park Avenue decision. And they rely on that case in support of their action against the Sewerage Authority as well as the other defendants, the Board of Education and the Township.

As to the Board of Education and the theory of the action against it and the Township with respect to schools, there are apparent and glaring differences which must be considered. The rationale of West Park was that schools are and have been historically supported by general taxation and consequently, in a position such as in the West Park Avenue case, was unlawful.

However, with respect to the claim against the Sewerage Authority, there are other basic factors involved not dealt with in the West Park Avenue case. However, the theory of the action against the Sewerage Authority is the name as I deem it, notwithstanding the complaint originally filed is and was unclear in this respect. And it was some time later, around the time of the pretrial conference, that the issues here shaped up in a way so as to fit the West Park decision.

You will have to read that sentence to me, the whole thing.

Appendix B

(Requested portion is read by the Reporter.)

The Court: So that keeping in mind the issues which plaintiffs contend the Court must consider as projected by them, I understand those issues to be duress, coercion and restitution on the basis of unjust enrichment.

The principal plaintiff, Mr. Cantor, and his former partner, Mr. Goldman, both testified that they had plans of a private sewerage disposal plant located on the site for this development of around 1669 homes. Mr. Cantor also said that he made a trip to Trenton or someone did in that connection. Nothing further was established by the plaintiffs nor was there any expert testimony offered that such a plant would be feasible in this so-called Deep Run drainage area.

Is that what it was called?

Mr. Journick: Yes, Your Honor.

The Court: So that at least an inference might be drawn from another substantial requirement in basing an entirely plan was unreasonable or arbitrary.

There was no evidence, that I can recall, which would lead me to find as a fact that there was any duress or coercion in the sense that the Sewerage Authority was engaged in an unlawful act or in a wrongful demand. The Sewerage Authority was created under the statute Title 40:14A and was given broad powers under the statute. It was created in 1954 in Madison Township and was still in its formative stages as testified by the former Executive Director when this developer's need for sewage disposal arose.

There was no proof of any alternative plan in detail offered by the plaintiffs to the Sewerage Authority or

anybody having authority. This, it may be said by the plaintiffs, would have been a futile gesture because of the Sewerage Authority's position and insistence on connection with the County trunk sewer. At any rate, the evidence of what the plant that was planned by the plaintiffs as they said was to be, and how it would suffice to satisfy the needs of the development as well as other interests in the municipality was not disclosed, and I find that if the plaintiffs ever had any such idea, it was merely an idea rather than any concrete or tangible plan.

I might go as far as to say that the absence of any other proof beyond that of an interested plaintiff, and Mr. Goldman, the brother of an interested plaintiff, the thought of an on-site plant may have been generated by this case. For it does appear that as early as March of 1957 a letter was sent inquiring of the Sewerage Authority requirements. But this latter analysis is merely a conjecture.

At any rate, the parties, that is, the Sewerage Authority and the plaintiffs predecessors, the plaintiff being the principal in these as well, did reach an agreement and it was reduced to writing. And it was clear from the record that the 24-inch line proposed by the developer was to care for the sixteen hundred odd homes it planned on developing, and was patterned for that purpose alone. This point I might, incidentally say, there was no proof as to what the cost of the on-site plant would have been, although plaintiffs did refer to the fact that they lost a business and intended to operate that plant as a business. This, of course, is rather remote to my determination here, in my opinion, and becomes quite speculative as any basis for my rulings here.

Appendix B

But, getting back to the contract, it appears that the parties dealt with each other as they would in any business arrangement. The Sewerage Authority properly looking ahead to the future fact that the line should be a larger one to care for subsequent needs of the municipality, and perhaps, even present and existing needs. And the agreement was that the Sewerage Authority would pay for the cost, that is, the difference between the 24-inch line required by the developer, and the larger size which the Sewerage Authority required. And it was unquestionable that the Sewerage Authority did remit to the developer the differential in cost to the sum of around two hundred and twenty some odd thousand dollars.

There was no formal protest ever registered by the developer to the requirement of the Sewerage Authority, and the line was completed around 1959. Am I correct about that?

Mr. Bierman: Yes, Your Honor. I believe late in 1959.

The Court: And this suit was not started until March of 1966.

In *Woodside Homes against Morristown,* the developer there at least had said, "I'll take you into court some day," as quoted by the opinion.

In addition, it appears that charges of $150 per house are required under the rules and regulations of the Authority notwithstanding that that may not have been a rule or regulation or had not been fixed at the time the contract was entered into between the Sewerage Authority and the developer. This in my opinion does not support the plaintiff's position here. The developer undoubtedly knew, and I find that it is a matter of common

knowledge with those conversant with those things, that connection fees are required. And it would be preposterous to believe that Mr. Cantor had the idea that he could tie in 1664 homes to a trunk line without a cost, whether there had been a specific rule or regulation on the subject or not.

Again it must be remembered that the Sewerage Authority was in its formative stages, and, in fact, it was said that this was its first customer. The sewerage problem of the municipality was delegated to the Authority under the statute and the basic policy was the menace of pollution and its prevention.

The statute provides that no sewerage disposal plant shall be constructed unless the Authority shall give its consent thereto and in this instance, plaintiff said the Authority would not give its consent.

Without any other showing on behalf of the plaintiffs, the Authority withholding its consent cannot be challenged, in my opinion. They had wide powers and they are dealing with matters of health and welfare of the greatest importance and the entity, that is, the Sewerage Authority created, presumably of expertise as stated in Retsky and their actions would presumably be valid unless shown to be unreasonable, arbitrary or capricious.

There was much to be done as a matter of general knowledge that would be required of a development of this size and which would take considerable time. I don't think that the plaintiff was, in any way, reluctant to institute a suit if he felt he was wronged. In fact, he did start such suits.

If he was opposed to any so-called pressure upon him, and I fail to find any in this case in connection with the

Sewerage Authority, a protest on his part may have, at least, permitted the Sewerage Authority to have their rights determined by the institution of a suit on their behalf.

I conclude that having waited from 1959 until 1966 and after all of their houses had long since been sold to start this suit, raises the question of estoppel as referred to in the Woodside Homes case.

There it was said that the appellant is estopped from presently asserting that Morristown abused its discretion. The appellant entered into a contractual arrangement with Morristown and it can't deny the efficacy of its undertaking. Morristown had been granted the authority to enter into contracts with consumers and so forth, 26 N. J. at page 543.

I think the same language is applicable here. In addition, it is apparent from the testimony that the plaintiffs, astute businessmen, weighed the matter before they proceeded and knew that connection fees would amount to substantially the same sum as the cost of the 24-inch line.

I also find that it is legitimately inferable from the record up to this point that the purchasers of the homes paid for them on the basis of sewers advertised as well as other improvements and factors and that the plaintiffs would be unjustly enriched if they recovered against the Sewerage Authority and that the Sewerage Authority has not been unjustly enriched, if any such claim can be made against such a body, in these circumstances.

I find that the plaintiffs' predecessors voluntarily entered into the contracts or the contract with the Sewerage

BLEED THROUGH POOR COPY

Appendix B

Authority and there was no duress or compulsion, in the sense that the developer was being compelled to submit to wrongful pressures.

Whether on-site improvements can be assessed against a developer is a question that the Supreme Court has left undecided in the recent case of Longbridge against Princeton. Whatever the decision may be by our highest Court on this question, I think there is a distinct difference between sewerage problems and things such as roads providing for access to a development.

I think it would be stretching the imagination a great deal to say that the Sewerage Authority, in this case, was a conscious wrongdoer.

What remains, I suppose, is the question of Statute of Limitations and laches. Not being a wrongdoer, the defendants could rely on laches on the basis of the West Park Avenue case. It seems to me that waiting from 1959 or from the sale of all of the houses in this development which was early in 1962 when the last was sold, until March of 1966 is an undue delay and that other interests become involved by the plaintiff proceeding as he did, advertising and selling as he did, and it would be inequitable in my judgment, at this late date, to permit him to have sat by idly all these years with no notice to the Sewerage Authority that it had a claim against it.

Since the reasons I have outlined form the basis of my ruling to grant the motion for the involuntary dismissal, it's not essential at this moment that I pass on the question of Statute of Limitations. If counsel for the defendant wants me to rule on that issue, I wish you'd

COPY BOUND CLOSE IN CENTER

give me some more authority and send your authority to your adversaries before you submit it to me.

Mr. Journick: Yes, your Honor.

The Court: Then I'll rule on that aspect of the motion as well.

All right.

Mr. Journick: Motion is granted, your Honor?

The Court: Motion is granted.

BLEED THROUGH POOR COPY

APPENDIX C

Oral Opinion of the Superior Court of New Jersey, Law Division, Rendered August 1, 1968

The Court [Hon. Abe S. Schwartz]: Saul Cantor and Mabel Cantor, his wife, bring this suit to recover $1,650,000 as the cost of schools and lands conveyed to the Municipality in the sum of $450,000 as costs of installing the sanitary sewer connections to the Middlesex County Sewerage Authority system which were off-site installations. Plaintiff's predecessors numerous corporations completed a development of 1664 homes known as Sayre Wood South in Madison Township. Mr. Cantor was the principal owner of the corporate interests and his partner in the development was Paul Goldman, his wife's brother.

The claim advanced is that the municipal agencies coerced the construction and donation of the schools as well as the sewerage line and that there should be restitution because of unjust enrichment; that the developer was under duress.

Plaintiff's predecessors purchased around 500 acres in 1955 and finally completed the complex of homes and sold the last in 1962.

Plaintiffs filed their complaint in March of 1966, entitled in lieu of prerogative writ. In the first count, plaintiffs sought variances from lot sizes for ten building lots denied by the Board of Education and on appeal, that was affirmed by this Court.

In the second count, plaintiff claimed the defendant Township breached a contract not to make any change in zoning and that plaintiff relying on the contract, expended $1,650,000 for the land and the school classrooms

COPY BOUND CLOSE IN CENTER

as required by the contract. The contract to be referred to later also provided that no change would be made for a period of five years.

The contract was dated May 19, 1958 and subsequently, the zoning ordinance was amended in 1964, April 17, 1964, after the five years had expired.

At any rate, plaintiffs have abandoned any claim to relief on this count for breach of contract.

In the third count, plaintiffs allege they performed all the terms of the contract dated May 19, 1958 and repeat paragraphs 1 through 9 of the second count and demand the 1964 ordinance be set aside and that ordinance be adopted to permit the uses specified in the zoning ordinance in effect on May 1958 and they require defendants to specifically perform the 1958 contract.

Since defendants have apparently performed and plaintiffs have abandoned the second count and do not press this count, the Court assumes it is likewise abandoned.

In the fourth count, plaintiffs again repeat paragraphs 1 through 9 of the second count and say they entered into the contract of 1958 because the Mayor and Council were concerned with orderly growth and the Township has had the benefit of schools for several years. And plaintiffs in an effort to cooperate and relieve defendant's concern over a large scale construction in any one year entered into the contract and plaintiffs demand $1,650,000.

The nature of this cause of action is not clear but the Court assumes this count is one which at pretrial was patterned by the plaintiffs to fit a cause of action based on duress and coercion, as well as restitution, rescission and unjust enrichment within the West Park case.

BLEED THROUGH, POOR COPY

Appendix C

The fifth count claims $450,000 expended for sanitary sewer lines in reliance on the 1958 contract and repeats paragraphs 5, 6, 7 and 8 of the second count, apparently again claiming breach of contract by amendment of the zoning ordinance, although not entirely clear what forms the basis of this count. At any rate, the breach of contract is abandoned.

The Sewerage Authority intervened and a motion for involuntary dismissal was granted in its favor at the close of the plaintiff's case.

In the sixth count, all of the paragraphs of the fifth count are repeated and plaintiffs say they performed the 1958 contract and therefore claim one, that the zoning ordinance be cancelled and two, demand a proper zoning ordinance be adopted to permit the uses specified in the 1958 ordinance and require defendant to specifically perform.

Here again there appears no evidence at all of defendant's failure to perform on the record during this trial and on the contrary, it appears that both parties have performed the agreement apart from the question of the agreement's legality.

In the seventh count, plaintiffs again repeat all of the first count and make the same allegations as in the fourth count but refer to defendants having had the benefit of the sanitary sewer line as compared with schools referred to in the fourth count and demand judgment for $450,000 being the cost of the sewers.

There was also another cause of action in lieu of prerogative writ which, as I recall, was consolidated with this cause of action and the variance sought in that case

was denied by the Board of Adjustment and that too was affirmed by this Court.

Nowhere was it said or even intimated in the complaint that plaintiff's engagement under the terms of the contract was not voluntary. Nowhere was it anywhere stated that plaintiff's predecessors acted under duress or coercion. With the exception of the breach of contract allegations which have been abandoned, it is most difficult to fanthom the theory of or the nature of the other causes of action. However, the plaintiffs refer to the pretrial order for support in fitting their case to the West Park Avenue v. Ocean Grove decision.

The pretrial order, paragraph 7 lists twelve issues and the only issue raised there in plaintiff's favor is unjust enrichment. The other issues pertinent here were advanced by the other parties, for example, the issue of voluntariness. However, I consider the language of the contentions of the plaintiff as alerting the Court to a theory based on duress and coercion since it uses those words or similar words, namely, "duress" and "pressure".

And there is also reference in the contentions to the effect that the developer had no choice which clearly implicates the question of voluntariness, duress and coercion.

However, on July 27 Counsel stated that they were relying exclusively on an equitable cause of action here. Whether this meant that they were abandoning duress and coercion, I really don't know.

At the outset of Counsel's summation, Counel for the plaintiff, it was also stated that the case rests upon unjust enrichment, restitution and rescission on which, I

BLEED THROUGH, POOR COPY

take it again, that plaintiff's rely on equitable relief. However, during the course of plaintiff's Counsel's comments, he again referred to duress.

At any rate, after analyzing and appraising the extensive record and placing credibility where I believe it is deserving and considering interest and lack of interest and the way in which the questions were answered, that is, whether responsive or evasive and drawing a legitimate inferences, I find the facts to be as follows: Around 1955 Madison Township was a rural community large in acreage with around 35 or some square miles, having a population of around 8,000 people and one of the schoolhouses described as having three rooms and the evidence clearly indicating that there were other schools, whether of the same size or not, I don't know. At any rate, the school population to be referred to shortly would indicate that there were other schools.

The developers were beginning to invade and the problems which come in the wake of mass development was becoming apparent to the citizens.

A referendum for a $700,000 bond issue had just been defeated for construction of classrooms. The Board of Education, prior to that time, sought permission to extend its bonding. The elementary school population, at that time, was about 1,500 and there were 400 high school students who were sent to receiving districts and these districts, it appeared would not continue and a high school problem is also a pressing one. People were begining to attend Board of Education meetings and the public, in general, was alarmed over the situation.

Two schools had already been given to the Township by developers. In this atmosphere, the developer of

Appendix C

Sayre Wood South, plaintiff's predecessor, conceived a development in Madison Township of 2,000 to 2,500 homes and purchased 550 acres in 1955 or around then. Its attorney and Mr. Cantor's partner, Mr. Paul Goldman, attended meetings to get the project moving and the attorney offered 55 acres and a school plus additional classrooms as required at a meeting in March of 1955 of the Planning Board.

The records disclosed that a figure of $80,000 was mentioned by Mr. Sevrin for the school and $10,000 for each additional room.

I conclude that this was not intended as a price which the Township was to pay but rather a description of the school, that is, the value the developer placed on the school and the rooms as his cost.

The plaintiff's interpretation that this was the price which the Township was to pay, if agreed upon, was not advanced, to my recollection, until near the end of the trial. And thus, the plaintiff's argued that it was to be paid therefore and thereafter they were coerced into the 1958 agreement and compelled to do it without cost.

Now, this interpretation is not a fair one, in my opinion, since if it were so, why was no price placed on the acreage, that is, the 55 acres and there are numerous records concerning statements of the attorney and other evidence opposed to plaintiffs recent contention?

Furthermore, the attorney was not called as a witness and his absence was not explained. I note for the record that he called in chambers several times asking when he would be required to testify and said he was available, if called at a convenient time, since he is now a Judge in the Division of Compensation.

BLEED THROUGH, POOR COPY

Appendix C

I passed these messages on to Counsel for the plaintiffs. This attorney could have been helpful to the Court in this connection, as well as many other areas, since he attended all Board and Agency meetings on the developer's behalf and it was concededly authorized. This attorney, in my opinion, would have been the most important witness for the plaintiff, if his testimony was to be favorable.

The developer obtained preliminary approval of its subdivision in March of 1956 and obtained so-called final approval by default on December 20, 1956 by a resolution of the Township Committee adopted on that night drawn by a developer's attorney in a room adjacent to the meeting chambers. It was clearly a lame duck Committee which acted on the final approval and it was clearly because the new administration would have given it a much closer look.

The record also discloses that final approval was only submitted, first submitted in November of 1956 and this was December 20.

I find that the developer knew that a development of the size proposed at first, about 2,000 or 2,500 houses, would meet with opposition. It was said to be the largest housing development in the Township up to that time.

I find that the developer realized he could not move quickly with a project estimated to take five years to be completed, if he did not provide schools, and that if he did not build schools, the saleability of his houses would be seriously affected and that he could not rely on the Municipality furnishing schools in time for his sales and his advertising in the existing climate in the Township.

Appendix C

In November of 1956, Mr. John Chamberlain was elected to the Township Committee. In that campaign, discussion was directed against mass housing and constrained on orderly growth. And Mr. Chamberlain considered his election a mandate and immediately took steps to control the situation. He did not recognize the final approval in this case as valid because of non-compliance with conditions, he said, as contained in the preliminary approval and which were not annexed or included with the final approval.

While I believe he was interested in putting a halt to mass housing, unless school needs were first adequately arranged, I find as he stated that he did not demand schools of this developer since this developer had already offered and there was no such problem. And I likewise find that no other official could pressure or demand on this developer since it was common knowledge that schools were offered by him.

At this point, I call attention to the ad in the New York Times dated October 12, 1958, where the developer advertised, "Schools inside the community paid for by the builder—no cost—no assessments to residents."

It appeared that the developer threatened a suit because permits were not forthcoming after the December 20, 1956 resolution granting final approval and the developer prepared a complaint which was submitted to Counsel for the Township. Thereafter, when the developer and the Municipality and the Board of Education had settled all problems as to conditions which Mr. Chamberlain, who was then Mayor, had been concerned with, a written agreement, Exhibit P-8, was prepared by the developer's attorney and recited that the Township

had questioned the final approval's legality and among other things, gave building code relaxation and assurance of sixty-five by one hundred lots for a period of five years to this developer and fixed the number of houses to be built each year. And while the agreement will speak for itself, it involved other items of substantial mutual interest besides reference to schools.

The agreement of 1958 referred to and all negotiations and discussions regarding it were held at public meeetings in the main by officials at the highest local level and the agreement, it was said by the witnesses, was authorized by each respective signatory. And it was said that the agreement in this case was required to be in writing because there was no development of this magnitude up to this time. As above noted the agreement did provide for concessions to the builder.

I find that following the signing of this agreement, permits were still not issued because road specifications and other conditions, such as sewerage and arrangements with the Sewerage Authority had not yet been completed.

Permits were finally issued in 1958, first for five models and then thereafter in 1958, additional permits were issued and the development was completely sold out in 1961 except for 22 houses sold in 1962.

I find from the evidence that the venture was a success, so much so that the prices were raised up to $1,000 for each home as sales progressed and this is separate and apart from any testimony by Mr. Bart.

I find that the principle plaintiff, Saul Cantor, was not responsive in many instances and was even evasive. Consequently, I question his credibility.

Appendix C

For example, he kept saying market value when he was pressed by Counsel to go into details as to pricing of homes. No official called by either side, to the best of my recollection, conceded any pressure on this developer, and I emphasize this developer, to contribute schools. Mr. Cantor had very little, if any, contact with any of the officials. All negotiations and steps required to bring the project to fruition was taken by the attorneys and Mr. Goldman, in some instances.

Mr. Goldman, a brother of Mrs. Cantor's, cannot be given full credit in the face of the record which I feel speaks more eloquent and the advertising and the delivery of the deeds as late as 1964, when the developer had long since completed this program and did not have to honor a "commitment" if he had not freely made it.

Mr. Goldman on cross examination said the land and schools were given on a voluntary basis. Over objection I permitted plaintiff's Counsel on redirect to ask what he meant by the word "voluntary" after Counsel argued the point. But I allowed him to answer and he said he meant they had no choice.

I place little credence on this unless he meant from the point of view of assuring success, their decision to build schools in the prevailing atmosphere was a must and he did not elaborate much further.

I find the developer did not fear the Township or recrimination or repercussions. It had no reluctance to threaten suit and it did start suits in several instances, one in 1955 for the reduction of permit fees from $25.00 to $15.00.

I find Mr. Cantor and Mr. Goldman were astute and sophisticated and experienced, as well as educated, and

it is not without significance that this suit was not commenced until March of 1966 when the developer was denied two variances as first above-mentioned in the suit which they started.

Wherever credit is needed for the support of plaintiff's case, I just can't seem to find it. It is wanting. The burden is on the plaintiff to establish their case by the preponderance of the credible evidence. I find the evidence preponderates in defendant's favor, particularly circumstantial evidence for which credibility is not needed as a factor to be weighed.

I find that the evidence preponderates in defendant's favor that the building of schools and the deeding of the land was voluntarily undertaken by the developer's best interest.

The complaint says that the developer "In an effort to cooperate and relieve the concern of the Municipal officials" proceeded as it did.

Paragraph three of counts four and seven.

Mr. Cantor, at that time, never used the word "involuntary" or "duress" or "coercion" or "unjust enrichment." This language was used in this case after the coming down of the West Park Avenue decision and perhaps shortly before and Mr. Cantor used such words freely in his testimony.

I did note, however, that unjust enrichment was used at the pretrial conference in September of 1967.

Plaintiff's Counsel argue that their case is four square with the West Park Avenue decision and have emphasized this throughout the trial. I find glaring distinctions.

In that case, 60 houses were involved and the builder paid $300.00 per house for permits or certificates of occupancy. The builder there never first offered to pay or to build a school in that case.

I find that the builder did do so in this case. In that case, the builder yielded to demands made at the administrative level and as pointed out by the Chief Justice "from orders from above." I'm not quite sure that's the exact language.

And in West Park, the builder had no choice, he said and signed the agreements to pay which were required of him. Here the dealings were with the highest officials at open meetings and by formal agreement in writing finally executed with authorization of each public body, notwithstanding, however, there may not have been any formal ordinance, if any were required.

The type of agreement referred to in West Park Avenue is not comparable with the offer made by the developer in this case or the agreement into which it entered.

In addition, 1665 homes required serious consideration to be given by the developer to the school situation in this Township, at that time. This what appears to me is by matter of common sense and most legitimately inferable. Sixty houses, however, was a far cry from 1665.

Moreover, the evidence preponderates, in my opinion, in favor of that supporting the defendant's contention that the offer was made and was voluntary in this case. In West Park, the developer made no offer. He unwillingly agreed to what the Court described as an agreement with a flimsy contractual overlay.

BLEED THROUGH, POOR COPY

Appendix C

The law, as I understand it, does not vitiate an agreement to build and give a school to a community. It is merely that a Planning Board cannot require schools as a condition, nor can any other municipal agency or the municipal governing body demand or require such a school.

The law, as I understand it, provides that a Planning Board cannot require schools as a condition since the Enabling Act does not include it in the improvements which may be required when provided for according to standards adopted by local ordinance, the New Jersey Statutes annotated 40:55-1.21.

The Legislature has authorized only improvements which are of peculiar benefit to the land under development in our State. This is not to say, however, that it is illegal for one to donate a school to a municipality and that it is unlawful for a municipality to accept it.

In West Park the Court did not pass on the requirements of duress, that is, that the victim must show he had no feasible remedy and it is stated that some Courts dispute the validity of such requirement but the Court said that the nature and degree of the wrongfulness may be the decisive factor because there is no simple formula since situations are so varied and the Court went on to say there that the wrong of the payee may be so gross that nothing else is relevant. And it was held there that the wrong of the municipality was so palpable that good morals dictated denial of the defense that "plaintiff was not valiant enough."

In my judgment, that cannot be said in this case since there were many and varied other circumstances here which are relevant as above noted.

Appendix C

In West Park Avenue, the builder received nothing. Here he bargained for concessions and advertised schools in his prices.

I find that the developer willingly and voluntarily offered the land and schools and was quite anxious to do so and other developers were likswise interested on the same basis, since they saw substantial profits in this fertile area.

I also find that the delay between the preliminary and final approval, such as it was on December 20, 1956, was not caused by demands for schools from this developer; nor was the delay from December 20, 1956, to the date of the issuance of the permits caused by effort to persuade the developer or to give schools.

The delay, I find, was caused by the Township's failing to recognize the so-called final approval because conditions were not provided for. Whether this was justified or not is not an issue. The schools were not a question, at this time, since I find it was understood by all that they were offered. However, details regarding the schools were being questioned and compliance with minimum requirements fixed by the Board of Education were being discussed and provisions for offices and nurse's rooms and so forth were being discussed and the number of houses to be built each year was being discussed and compliance with the sewerage requirements was being discussed.

All this took time and perhaps delayed the progress of the developer but the suit is not one for damages due to such delaying action by defendants, if there was delay. It is for recovery of the value of the land and schools which plaintiff claims were demanded and from

which the builder had no escape because of circumstances in which he found himself.

I find he offered and gave the schools, as I have already noted, and that there was never any issue between these parties in those years from after preliminary approval on March 18, 1956 until 1958 when the permits were issued.

I find it worthy of note too that the plaintiff did not produce any engineer and particularly, Mr. Reilly, who undoubtedly participated in negotiations with the Planning Board; nor was the architect who the record discloses had considerable dealings with the Board of Education; nor were there any records produced with respect to costs.

It was clear from Mr. Cantor's testimony that he met officials on or about two occasions, he testified for nine days. The two occasions, as I remember it, were in 1957. However, Mayor Chamberlain conceded only one meeting with him.

Was this the conduct of a man with a seventy-five percent interest in a multi-million dollar venture which was foundering because of pressure placed on him? If the obstinacy of the officials slowed his progress to a standstill, as he asks the Court to believe and presented the specter of disaster as he said, one would expect that he had the time to and would have taken a personal hand in the matter to a greater extent.

The picture he painted was that his future depended on it.

Mr. Cantor was and is an educated man. He undoubtedly could have expressed himself if he desired to at in-

formal meetings such as are held by Planning Boards, as well as by meetings of Boards of Education. It is incredible that he relied mainly on his attorney when things reached such a pass; and particularly when that attorney is not produced as a witness so that the matter may be explored since his relationship to Mr. Cantor and the activities here was a very close one.

I find that the Township was seeking assistance from builders and that many of the officials felt that builders were obligated, not only morally but legally to ease the impact of new housing on local school facilities and that agreements were sought from builders to construct schools or to pay a sum for each house. In fact, Mr. Kerr, who played a significant role against the mass housing, said he still is not convinced it is illegal and billboards were even erected warning possible prospective purchasers of the school situation.

However, I also find that the developer of Sayre Wood South and most other developers desiring to get a foothold in Madison Township were eager to offer schools since they saw large potential in this area.

I find that plaintiff's cause of action at law for damages accrued at the latest when the May 1958 agreement was dated. This was more than six years prior to the commencement of this suit and it is therefore barred as an action at law.

I have dealt with the duress and coercion theory notwithstanding what I have already said regarding plaintiff's Counsel's comments concerning the theory on which they rely both during the trial and during the closing comments. Actually, I am not completely certain what Counsel have meant and I dealt with duress and coercion.

Appendix C

With respect to relief for unjust enrichment and restitution, I found that the developer exploited the fact that schools were available and built by it. The proofs disclose that schools were constructed and ready for the houses before or, at least, at the time sales of the houses commenced. Both Mr. Cantor and Mr. Goldman conceded that schools had an influence on market value and expert defense witnesses said the same.

It was also said by a defense expert that lending institutions are interested in whether or not schools are available as well as having interest in the taxes.

In this area Mr. Cantor hedged in his testimony. Mr. Gaull, an expert with a long list of qualifications, said that if you have no schools, you have no sales and in three and four bedroom houses being sold to young couples, this would appear apparent without expert testimony.

At any rate, no witness was presented by plaintiffs to express the contrary. The developer distributed a brochure picturing schools to prospects and advertising schools as follows: "Schools inside the community paid for by the builder—no cost—no assessment to residents." New York Times, October 12th, 1958. "Three new schools on the property at our expense," New York Journal American, November 28, 1958. "Back to school on the property." "This is a typical photo of healthy, happy children attending one of the three new schools on the property." "Schools inside the community paid for by the builder—no cost—no assessment—classrooms ready when you move in." New York Times, September 14, 1958.

The brochure referred to was marked Exhibit DT-16. I pause here to note that if the developer was not to build

the schools at his expense or at its expense, that advertisement or that advertising was misrepresentation and was perpetration of a fraud on purchasers.

The salesmen on the premises pointed out their schools in their sales talk. I found from the facts and circumstances that the cost of schools was an intimidation in the sales prices and that the purchasers paid the prices they did based on school availability and the existing rate. This I consider too a most legitimate inference.

In Legion Manor v. Wayne 49 N. J. 426 our Supreme Court said, "Both owners have a distinctive interest in that as a practical matter they paid for the public improvement through the purchase price for their properties."

The question in Legion Manor was whether residents of a development were entitled to notice before a builder's performance bond would be cancelled. The Court held they were and that the builder could be required to give them notice.

The context, of course, was not the same but the inference is just as appropriate in this case as in Legion Manor.

In Woodside Homes v. Morristown already referred to in this case at 26 N.J. 530 or 529 was a suit to recover the cost of extension of water mains. The Supreme Court there noted too that the cost of the extension of the water mains was passed on by the appellant to purchasers of homes via the sales price. Whether there was actual proof in that case that that was so, I really can't say but I assume what the Court was saying here was the conclusion they drew.

Appendix C

For plaintiffs to recover here would consequently mean unjust enrichment on their part. The defendants were not unjustly enriched since the people in the development paid for the schools. If the municipality had constructed these schools, all of the taxpayers would have shared in the cost. The fact that the development residents paid this entire cost was a benefit to the remaining taxpayers.

This, of course, was an inequity since such services have been "traditionally supported by general taxation" as said in West Park Avenue but that inequity cannot be corrected here. If anything, it would be compounded by a judgment if one were granted here and the purchasers again required to pay the appropriation through taxes.

Incidentally, I agree there is no distinction in whether cash or school buildings are demanded as within the rational of the West Park Avenue case. But my agreement was that only goes to the extent that where there are no other facts and circumstances. I do not agree that there is no difference between cash or schools, under the circumstances in this case.

I understand West Park Avenue to hold that plaintiff's action there was one at law, namely, a conventional action for damages. And therefore the Court said "laches was not relevant." The Court, in my opinion, went on to say by dictum that even if it were relevant, defendant did not make out the defense because it was not prejudicial and because laches is not available to a conscious wrongdoer.

I find there was no conscious wrongdoing on the part of the defendants in the periods from the developer's entrance into Madison Township and through 1958 with respect to this developer.

Appendix C

If, notwithstanding what I have said, plaintiffs do have an equitable cause of action, then I find they are barred by laches since not only is it a practical impossibility to unravel the financial situation after the sales of the houses and to place innocent persons in the status quo but in addition, key persons who played significant parts in the years covered by this development are no longer alive.

In West Park Avenue, it was clear that it was not inequitable to order restitution. The same cannot be said here.

I note that comment A in Section 142 of the Restatement on Restitution states, "The rules stated is an application of the underlying principle of this subject that restitution is granted only where it is equitable to do so. Where events are such that a loss must be suffered by one of the parties, either with or without the ability to obtain reimbursement from a third person justice does not require that a recipient should bear this loss where he is guilty of no greater fault than that of the claimant."

I find the defendants guilty of no greater fault, if any than plaintiffs; at worse, both realized the law did not permit a municipality to require schools as a condition and both were advised that a donation was not prohibited.

I also note that their comment, Page 570 of the Restatement Section 142 Restitution states "where an overpaymen has been made to a municipality—the fact that there has been some shifting of population so that persons who receive no benefit would be taxed is not ordinarily ground for denying restitution. The overpayment however may be so great, especially in a case of a small community, that it would be inequitable to the new taxpayers to require restitution to be made."

Appendix C

In concluding, I would note that if the defendants were the conscious wrongdoers pictured by Mr. Cantor, would they have authorized and signed a written agreement through the highest officials locally, the Mayor and the Clerk and the President of the Board of Education, requiring the developer to do what they knew was unlawful and take the risk that the agreement would be uninforcible? Isn't it more likely that they would have required the deed in advance as a quid pro quo for the approval or permits? Would they have provided that "the matters hereinafter set forth would become proper and legal by proper ordinance of the Township"? And if the defendants were the wrongdoers painted by plaintiffs, would the plaintiffs six years after the contract of 1958 have turned over deeds to these schools and lands at ceremonies where Mr. Cantor accepted the greatful appreciation of the municipal officials and was photographed handing the deeds to the town?

It does not ring true and is not the common experience of mankind.

Would Mr. Cantor and Mr. Goldman part ways, as it was said, and not discuss a potential $2,000,000 claim? All Mr. Cantor said is that he assumed all liabilities and he got all the assets, or something to that effect.

It is unbelievable that a man with Mr. Goldman's interests in the venture would not have required some arrangement regarding this.

I also refer to the following exhibits to point out the cordial relationship between the developer and the municipal agencies, as well as bearing on other relevant factors: Exhibit DB-4 in evidence, DB-5 in evidence, DB-6

in evidence, DB-8 in evidence, DB-9, DB-10, DB-11, 12, 14, 15, 17, 19, 23, 31, 38, 40, 42, 48, 50, 51, 56, 57, 62, 65.

Of course, this is not to say that the other exhibits do not have a bearing on my conclusions.

I do not believe the lands and construction costs for the schools can be evaluated at the figures plaintiffs fixed in their complaint nor in plaintiff's briefs.

While it is difficult for me to do so, I find from the meager evidence that these items could be reasonably valued at around $600,000 or $700,000, at the most.

I might add that the proofs in this area, of course, were very sketchy in a case demanding such substantial amounts. At any rate, I find it to be a reasonable and legitimate inference and conclusion that a sum of $350.00 per house was, at least, considered by the developer in fixing his prices to cover the said cost.

To summarize, plaintiffs have not established by a fair preponderance of the credible evidence that this developer was under duress and coercion. On the contrary, it appears from the credible evidence that the builder, in his own best interest, offered what he did willingly and voluntarily, namely, land and schools and the business judgment used in making that offer turned out to be in its best interest by the phenomenal success of the development.

In connection with duress again, I question whether the complaining party was constrained to what it otherwise would not have done or was the will of the complaining party or the victim really overborne? My answer is in the negative. See S. P. Dunham v. Cudra, 44 Super. 563 p. 570.

Appendix C

I have not considered profits per se, as testified to by any witness, and have not based my findings or conclusions anywise on such testimony.

I did not conceive that such testimony was relevant by itself. It is my opinion that the developer could have had a loss and my result would have been the same providing the facts led to the irresistible conclusion, as I find it does here, that the purchasers paid for the schools via the purchase price.

I find there was no unjust enrichment by the defendants, under the circumstances. I have already stated my views as to the Statute of Limitations and laches.

I find there was no wrongful conduct on the part of any municipal official concerning sewerage connections to the county trunk sewer lines as required by the Township Sewerage Authority and as agreed in writing by the said Authority and the developer.

The claim for offsite sewers here is no stronger than against the Sewerage Authority.

As to rescission, I am somewhat at a loss to understand how this fits in the picture in view of the theories finally fixed at this trial. Chief Justice Weintraub in West Park Avenue intimated that the plaintiff there both inferred unnecessarily that it might need equitable aid to recind the agreements but held it was a conventional action at law.

This suit was also brought in the Law Division. No authority was advanced by Counsel on the rescission theory separate and apart from the West Park Avenue case. I note rescission of the contract must be brought promptly. The agreement was dated May 1958 and suit started here in March of 1966. I fail to see what there is

to rescind since both parties performed as required by the agreement whether or not it might at some earlier time have been vulnerable to attack and rescinded.

There is no claim made of a wrong prior to December 20, 1956. I note that the development was completed substantially and sold out by the end of 1961 and this was practically within the time table of five years projected for the completion as estimated by the developer and bears on the question of the delay complained.

You may submit an order in accordance herewith.

APPENDIX D

Portion of Letter Opinion of Superior Court, Law Division, dated June 14, 1968

June 14, 1968

Herbert B. Bierman, Esq.
777 Washington Road
Parlin, N. J. 08859

Richard F. Plechner, Esq.
351 Main Street
Metuchen, N. J.

Marc J. Gordon, Esq.
Margolis, Margolis, Turak & Gordon
1060 Broad Street
Newark, N. J. 07102

Alfred J. Hill, Esq.
Wilentz, Goldman & Spitzer
252 Madison Avenue
Perth Amboy, N. J.

Francis X. Journick, Esq.
Wilentz, Goldman & Spitzer
252 Madison Avenue
Perth Amboy, N. J.

Re: Cantor v. Zoning Bd. of Adjustment of the Twp. of Madison, et al.
Docket No. L-20752-65 P.W. and
Docket No. L-20816-65 P.W.

Gentlemen:

This is a consolidation of two separate actions in lieu of prerogative writs to review the denial by the Zoning

Appendix D

Board of Adjustment of the Township of Madison, of a variance in one case for commercial use in a residential zone (Count One of Docket No. L-20752-65 P.W.), and in another for the creation of ten undersized building lots (Count One of Docket No. L-20816-65 P.W.). Each of said actions also seeks a jury trial for damages for which a date has been fixed.

I.

Count One of Docket No. L-20752-65 P.W.

The application for the use variance concerns the tract located on the southwesterly corner of Throckmorton Lane and State Highway Route No. 9 and is known as Block #519, Lot #25B2, on the Tax Map of the Township of Madison. The application is for a drive-in restaurant to be operated by the Goody Restaurant System, Inc. The restaurant will serve hamburgers, coffee, cake and other food items to persons who will consume the food on the premises or remove same from the premises.

The tract in question, although zoned for residential use, is surrounded by commercial enterprises of various kinds, including a supermarket, smaller stores, and professional offices. In addition, in the vicinity of the tract is the Madison Township High School and to the west and directly adjacent to the tract is the Browntown Water Company, where water treatment for the Township is effected. Directly across the street from the tract is Engine Company #2 of the Madison Township Fire Department. The tract backs into an area on which stands a housing development of approximately 1,700 homes, which were built by the applicant; and the parcel in question is a portion of the land assembled by the applicant for this development.

BLEED THROUGH POOR COPY

Appendix D

Plaintiffs, on January 4, 1966, applied to the Building Inspector of Madison Township for a building permit to construct the drive-in restaurant on the tract. The application was denied, after which plaintiffs appealed to the Board of Adjustment for a variance from the Zoning Ordinance so as to permit such a use. On January 14, 1966, a public hearing was scheduled after due notice according to law to all parties in interest. The hearing so scheduled was adjourned and plaintiffs were instructed by the Board to provide for a public hearing at its next meeting on February 11, 1966.

At the February 11, 1966 meeting, plaintiffs presented two expert witnesses who testified as to the commercial character of the area surrounding the tract. Many objectors expressed their views, urging denial of the application. The Board adopted the following resolution, denying the application:

> "Whereas the Zoning Board of Adjustment of the Township of Madison finds that the applicant has failed to show special reasons sufficient to support it a variance for the proposed use, and whereas the proposed use is not the best and highest use for the land in question, and whereas the Board finds that the proposed use would have a deleterious effect upon the Zoning Plan of the Township of Madison, and whereas the Board finds that the proposed use would detract from the public health and safety of the Township of Madison by creating a traffic hazard and congestion and by placing a food handling establishment in too close a proximity to one-family dwellings to be in keeping with the highest health and sanitary standards for such

> an area, and whereas the Board finds that the proposed use would have a detrimental effect upon surrounding properties, now, therefore be it resolved that the Zoning Board of Adjustment of the Township of Madison does hereby deny the application of Saul Cantor, Trustee for Robin and Hope Cantor, to allow the placing of a restaurant upon the premises known as Lot 252, Block 519 of the Tax Map of the Township of Madison." (Commercial Use Transcript, p. 66, Feb. 11, 1966).

Plaintiffs in their brief argue that the above resolution does not contain adequate findings of fact. This court is of the opinion that the resolution on its face does contain adequate findings of fact. The inquiry for the court is whether the stated findings of fact have a basis in the evidence in the record.

It is a well-known rule of law that the action of a board of adjustment denying an application for a variance is presumptively correct, and the burden of establishing otherwise is upon the party challenging the board's action. *Mullin* v. *Zoning Bd. of Adjustment of Millburn Tp.*, 85 *N. J. Super.* 180 (1964), affirmed 44 *N. J.* 321 (1965).

Plaintiff's application for a variance is made under N.J.S.A. 40:55-39(d), arguing that "special reasons" exist for the grant thereof. In addition, the use variance must meet the negative criteria of *N.J.S.A.* 40:55-39(d):

> "No relief may be granted or action taken under the terms of this section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

Appendix D

The Board in its brief and at the hearing before the court concedes the unsuitability of the tract for residential use and its suitability for commercial use. Because of this concession, it is unnecessary to find support for that portion of the resolution which states "the applicant has failed to show special reasons" for a business or commercial use. Nevertheless relief cannot be granted unless the negative criteria of *N.J.S.A.* 40:55-39(d) are met.

Norman Silverstein, plaintiffs' expert, testified that the restaurant would serve, on an average, roughly 240 cars (Commercial Use Transcript, p. 7). The witness explained that the figure of 240 was a mean average—higher in the summertime and lower in the wintertime. Mrs. Maude Devine, an objector, stated that according to the Madison Township Police Map 13 accidents, including one fatality (Commercial Use Transcript, p. 24) happened on the corner where the tract in question is located. Ray Hoerger, a representative of Engine Co. #2 of the Madison Township Fire Department, stated that the firehouse is located across the Cantor tract; that traffic is now very bad; and that should the variance be granted, a pronounced traffic hazard would surely result. Mr. Hoerger explained that Route 9 is used in the summertime to reach the Freehold Race Tract [*sic*] and traffic at that time is especially heavy.

It was the opinion of plaintiffs' expert, Mr. Silverstein, that no traffic hazard would be created (Commercial Use Transcript, p. 7). Mr. Silverstein also opined that the restaurant would "maintain the highest sanitary standards" and explained how the refuse would be collected and stored for removal (Commercial Use Transcript, p. 6).

An objector, Mike Ortenzio, stated that a drive-in restaurant similar to the proposed use (although operated

by a different firm) is on the same highway and has a refuse system similar to what Mr. Silverstein described as the Goody operation. Mr. Ortenzio remarked:

> "As far as receptacles, I would say they have twenty or thirty of them and every time I go by there I see an awful lot of cardboard, papers and pieces of hamburger meat on the floor. This, to me, would attract rodents—in other words, rats." (Commercial Use Transcript, p. 40).

Also many objectors stated that the reason for opposition to the restaurant was that it would become a "teenage hangout."

In *Morris* v. *Postma,* 41 *N. J.* 354 (1964), the Court upheld a zoning ordinance prohibiting drive-in restaurants. Although arising in a different context, the Court's language is apt in the consideration of plaintiffs' contention in the instant case that the board of adjustment acted in an arbitrary fashion:

> "A drive-in restaurant use is concededly not illegal, nor necessarily a nuisance. However, the borough's experience with the other drive-in restaurant led it to conclude that this type of business use was susceptible to and resulted in rowdyism, litter and related problems affecting the public health, welfare and safety. This conclusion cannot be said to be unwarranted. The record indicates that other municipalities have legislated against this type of business use." (*Id.* at 360)

Based on the Zoning Act and the transcript of the proceedings before the Board of Adjustment, this Court is of

the opinion that the resolution of the Board finds adequate support in its conclusion that the proposed use would create a traffic hazard, be too close to residences so as to affect health and sanitation and have a detrimental effect on surrounding properties so that relief cannot be granted "without substantial detriment to the public good." The decision of the Board is affirmed.

* * *

Very truly yours

s/ ABE S. SCHWARTZ

APPENDIX E

Order of the Supreme Court of New Jersey Denying Petition for Certification

(Filed—January 27, 1970)

SUPREME COURT OF NEW JERSEY

C-185 September Term 1969

SAUL CANTOR, *et al.*,

Plaintiffs-Petitioners,

v.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, *et al.*,

Defendants-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 27th day of January, 1970.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX F

Order of the Supreme Court of New Jersey Denying Motion for Reconsideration

(Filed—March 10, 1970)

SUPREME COURT OF NEW JERSEY
M-155 SEPTEMBER TERM 1969

SAUL CANTOR, *et al.*,

Plaintiffs-Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT, TOWNSHIP OF MADISON, *et al.*,

Defendants-Respondents.

This matter having been duly presented to the Court, it is Ordered that the motion for reconsideration of Petition is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 10th day of March, 1970.

JOHN H. GILDEA
Clerk

APPENDIX G

Excerpts from Zoning Ordinance of Township of Madison Adopted April 27, 1964

ARTICLE VII. R-20 RESIDENTIAL ZONE

1. *Permitted Uses.*

A. One-family dwellings.

B. Churches and similar places of worship, parish house, convents and cemeteries, subject to the conditions specified in Article V, Paragraph 16.

C. Public and quasi-public Schools and institutions of higher learning which are not conducted as a business subject to the conditions specified in Article V, Paragraph 16.

D. Municipal Parks, playgrounds, and other municipal buildings and uses as are deemed appropriate and necessary by the Township Council.

E. Other public buildings of a governmental or cultural nature.

F. Customarily and conventional farming operations except the keeping or raising of livestock, fowl, and fur bearing animals, and provided that no roadside stand or other building shall be used to sell farm products at retail from the premises.

• • •

ARTICLE VIII. R-15 RESIDENTIAL ZONE.

1. *Permitted uses.*

A. Same as specified for the R-20 Zone in Article VII, Paragraph 1.

BLEED THROUGH POOR COPY

Appendix G

2. *Permitted Accessory Uses.*

A. Private garage space for the storage of one (1) motor vehicle for each five thousand (5,000) square feet of lot area but not more than four (4) such spaces.

B. Signs as specified for the R-20 Zone in Article VII, Paragraph 2B.

C. Customary farm buildings as permitted in the R-20 Zone in Article VII, Paragraph 2C.

D. Other customary accessory uses as permitted in the R-40 Zone in Article VI, Paragraph 2F.

3. *Other Uses Permitted upon application to the Board of Adjustment for Special Permit.*

A. Same as specified for the R-20 Zone in Article VII, Paragraph 3.

4. *Area, Yard and Building Requirements.*

A. As specified for this Zone in Schedule, Article IV of this Ordinance unless modified in accordance with the standards set forth in Article XVIII.

B. In such cases as a lot in this zone does not have public water and public sewerage facilities available to it or for other reasons it is not connected to such facilities, the lot shall comply with the requirements of the R-20 Zone insofar as lot area and frontage is concerned. All other regulations for this zone shall be complied with.

5. *Other Provisions and Requirements.*

A. Same as specified for the R-20 Zone in Article VII, Paragraph 5.

• • •

LE COPY CORRECTED COPY

FILED
JUN 10 1970
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1969

No. 1542

SAUL CANTOR and MABEL CANTOR,

Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, a municipal corporation of New Jersey, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION,

Respondents.

REPLY OF RESPONDENTS, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

HAROLD G. SMITH
Attorney for Respondents
252 Madison Avenue
Perth Amboy, New Jersey 08862

MARC J. GORDON
ALFRED J. HILL
FRANCIS X. JOURNICK
Of Counsel to Respondent

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587

TABLE OF CONTENTS

Page

Question Presented 1

Statement of the Case 2

Argument:

Point I. The Courts below were fully cognizant of the long established principles of New Jersey Law which were in full accord with the dictates of the Fifth and Fourteenth Amendments to the Federal Constitution; petitioners have simply failed to prove such facts at trial as would have required the application of those settled principles and consequently a Writ of Certiorari should be denied. ... 7

Conclusion 11

Contents

Page

Table of Citations

CASES CITED:

Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957) 8

Midtown Properties, Inc. v. Madison Twp., 68 N.J. Super. 197 (Law Div. 1961), affirmed o.b. 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1966) 8

West Park Avenue, Inc. v. Ocean Twp., 48 N.J. 122, 224 A.2d 1 (1966) 8

RULES CITED:

R.R. 1:1-1A (now R. 2:12-2) 6

Statutes Cited:

N.J.S.A. 40:55-39 4

N.J.S.A. 40:14A-1, et seq. 3, 4

OTHER AUTHORITIES CITED:

United States Constitution, Fifth and Fourteenth Amendments 7

IN THE

Supreme Court of the United States

October Term, 1969

No.

SAUL CANTOR and MABEL CANTOR,

Petitioners,

vs.

ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MADISON, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, a municipal corporation of New Jersey, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION,

Respondents.

REPLY OF RESPONDENTS, MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, MADISON TOWNSHIP SEWERAGE AUTHORITY and MADISON TOWNSHIP BOARD OF EDUCATION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Question Presented

Will a Writ of Certiorari be allowed where the petition indicates only that petitioners utterly failed to prove at the trial level of a state court such facts as would warrant the application of certain principles of law consonant with the Fifth and Fourteenth Amendments to the Federal Constitution, which principles of law have long been firmly established and enforced by the courts of that state?

Statement of the Case

Petitioners were principals in and are the successors in interest to Pershing Park, Inc., and 42 other New Jersey corporations which developed and sold a development of 1,664 houses known as "Sayre Woods South" in the Township of Madison, Middlesex County, New Jersey. The number of corporations used has no substantive significance and they were probably part of a tax shelter scheme. Throughout the proceedings the petitioners acted as the only and real parties in interest. The project was conceived in 1954, the necessary land was acquired in 1955 and 1956 (Pa473-4 to 16),[1] and construction commenced in 1959. The development was a huge success; title to all but a few of the 1,644 homes closed by the end of 1961 (Pa1963 to Pa1966).

The facts which can be derived from the record have been presented in detail in the joint Reply Brief filed by the respondents, Township of Madison, the Mayor and Council of the Township of Madison (both being designated hereafter

1 References are to the Petitioners' appendix filed in the Appellate Division of the Superior Court of New Jersey.

"Township"), the Madison Township Sewerage Authority (hereafter "Sewerage Authority") and the Madison Township Board of Education (hereafter "Board of Education") in the Appellate Division of the Superior Court of New Jersey and in the Joint Reply to the Petition for Certification of the same respondents filed in the Supreme Court of New Jersey. This Court is urged to consider the statements of fact as well as the legal arguments there presented. A short summary of the salient facts should suffice here.

The idea for a development of the type and size of "Sayre Woods South" was first conceived in 1954. By 1956 petitioners had taken title to or otherwise acquired control of the raw lands necessary for the development. Preliminary subdivision approval was obtained in ordinary course. Final subdivision approval was issued by a lame duck municipal administration on December 20, 1956 (Pa1730). A new administration took office on January 1, 1957 and asserted that substantial defects in the final subdivision approval existed. After petitioners threatened litigation unless an agreement was reached, petitioners and the Township entered into a written agreement dated May 19, 1958, concerning the validity of the final subdivision approval, certain building code and zoning concessions, and other matters, including provisions for schools (Pa2419).

At about the same time the Sewerage Authority (created pursuant to N.J.S.A. 40:14A-1 et seq.) deliberated petitioners' application for the approval of a sewage disposal system for the development. Because of the great size of the development and the fact that it was close to the established regional

facilities of the Middlesex County Sewerage Authority (created pursuant to N.J.S.A. 40:14A-1 et seq.) the Sewerage Authority refused to allow either individual septic systems or an on-site "package plant." The Sewerage Authority insisted that sewage collected within the development be carried by connector line to the existing trunk line of the Middlesex County Sewerage Authority from whence it would be carried to that Authority's regional disposal plant. Recognizing probable future development in that area of Madison Township, the Sewerage Authority gave consideration to a larger connector line than that which would suffice for petitioners' development. After some negotiation, a contract was executed on April 21, 1958 between the Sewerage Authority and the petitioners which provided for the construction of a connector line of a size in excess of that needed for the petitioners' development. While the agreement provided that the Sewerage Authority would pay petitioners not less than $210,000 for the increase in the size of the line, actual payments to the petitioners amounted to $231,000. The line was completed in 1959 and since then has been maintained by the Sewerage Authority. No fees were charged to the petitioners for the privilege of connecting the 1,644 homes in the development to the connector line.

On December 30, 1965, and January 4, 1966, petitioners applied to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55-39 for variances from the then current zoning ordinances to construct a hamburger stand and other uses on two parcels "left over" from the development (Pa1; Pa31-20). When these variances were denied, plaintiffs filed two complaints in lieu of preroga-

tive writ on March 30, 1966, to set aside the denials (Pa1; Pa31). Each of the complaints also contained counts seeking damages for $1,650,000 as the cost of schools and school lands conveyed to the Board of Education and $450,000 as the cost of installing the connector line carrying the sewage generated by the development to the regional treating facilities of the Middlesex County Sewerage Authority. The complaints were the first indication of any claim by petitioners.

Aside from their lateness, another facet of the complaints is that their content enables a true assessment of petitioners' motives in filing them and, consequently, a true assessment of the validity of the petitioners' claims. Although the complaints sought damages for schools and school lands conveyed to the Board of Education and for a connector line dedicated to the Sewerage Authority, neither the Board of Education nor the Sewerage Authority were originally joined in the suits as party defendants. The only defendants named and joined were the Township of Madison, the Mayor and Council of the Township of Madison, and the Board of Adjustment. The Board of Education and the Sewerage Authority were later permitted to join as intervenors upon their motions. While both complaints were consolidated for trial by consent, those aspects of the dispute concerning the validity of the denial of the variances were separately disposed of by the Law Division of the Superior Court on briefs and on the record adduced before the Board of Adjustment.

The primary relief sought in each complaint was a reversal of the Board of Adjustment denials and, almost as an afterthought, certain counts

were included asserting that the Township and Board of Adjustment were liable for damages — not for unlawful coercion, but for breach of contract! Later the petitioners asserted that they were coerced into executing the very contracts which they earlier had asserted were breached by the respondents!

The claims involving the schools and connector sewer came on for trial before Judge Abe S. Schwartz sitting without a jury. When petitioners rested, the claims against the Township and the Sewerage Authority concerning the connector sewer were dismissed (Pa75) on the grounds that petitioners had failed to prove any coercion and that the Sewerage Authority, in insisting upon proper disposal and paying for the requested over-sizing of the line, had not been shown to have acted arbitrarily. Similarly, at the end of the entire case, judgments in favor of the Township and Board of Education with respect to the remaining claims were entered (Pa77) on the grounds that no coercion had been proven.

Petitioners thereupon took an appeal to the Appellate Division of the Superior Court (Pa80) and while that appeal was pending they made application pursuant to former New Jersey Court Rule R.R. 1:1-1A (now R. 2:12-2) for certification of the appeal by the Supreme Court of New Jersey (Da,pc-1).[2] That application was denied (Da,pc-8). The Appellate Division thereafter affirmed the judgments below in a per curiam

2 Reference is to these Respondents' Appendix filed in reply to the Petition for Certification in the New Jersey Supreme Court.

opinion dated November 10, 1969 (Pa,pc-1).[3] Petitioners then filed a Petition for Certification with the Supreme Court of New Jersey which was denied and reported in 55 N.J. 316, 261 A.2d 359 (1970). An Application for Reconsideration of the Petition for Certification followed and was also denied.

The Township, Board of Education and Sewerage Authority provide this reply to Petitioners' Petition for Certiorari only insofar as the claims concerning the schools and connector line are concerned. The matters raised in the Petition for Certiorari concerning the zoning issues will be the subject of a separate reply to be filed by the Zoning Board of Adjustment.

Argument

Point I

THE COURTS BELOW WERE FULLY COGNIZANT OF THE LONG ESTABLISHED PRINCIPLES OF NEW JERSEY LAW WHICH WERE IN FULL ACCORD WITH THE DICTATES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION; PETITIONERS HAVE SIMPLY FAILED TO PROVE SUCH FACTS AT TRIAL AS WOULD HAVE REQUIRED THE APPLICATION OF THOSE SETTLED PRINCIPLES AND CONSEQUENTLY A WRIT OF CERTIORARI SHOULD BE DENIED.

During the appellate history of this case petitioners have repeatedly given evidence that they apparently suffer from a malady which compels them to assume facts which are not existent in the record. They then argue that admittedly

3 Reference is to the Petitioners' Appendix filed with their Petition for Certification in the New Jersey Supreme Court.

settled principles of law were not applied to such facts. For example, it is asserted in the Petition for a Writ of Certiorari (p. 8) that petitioners were "...compelled to donate school lands and buildings without compensation..." and that they were also "...compelled to construct an off-site sewerage line without just compensation." If that were factually correct, these respondents would have no alternative but to concede the propriety of a Writ of Certiorari. However, a review of the extensive record reveals that no credible evidence of the compulsion of schools or the connector line was adduced at trial and consequently the trial court found that no such facts existed. As a result, the trial court as well as the appellate courts below, not having been given the facts necessary to apply the pertinent doctrines of law, found against petitioners.

All of the courts below were well aware of the principles enunciated in cases such as West Park Avenue, Inc. v. Ocean Twp., 48 N.J. 122, 224 A.2d 1 (1966); Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957); and Midtown Properties, Inc. v. Madison Twp., 68 N.J. Super. 197 (Law. Div. 1961), affirmed o.b. 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1966), which may be summarized as prohibiting municipalities and their agencies from coercing a developer into conveying schools or other benefits to a municipality by withholding building permits or other municipal approvals. Such action would clearly be an unconstitutional deprivation of property and a denial of equal protection of the law. But it is also true that there is no provision of law, either state or federal, which prohibits the promoter of a vast development such as that involved here from volun-

tarily making school lands and buildings available to a municipality without charge. Why would a developer do this? It must be realized that the project did not involve a few or even a hundred homes but was of such breadth as would stagger the imagination. It was apparent that the essentially rural municipality of Madison Township would be unable, even if every municipal official were to work in good faith to their respective limits of ability and endurance, to provide schools to serve the development on a schedule which would accord with the petitioners' time-table of completion. Since the availability and convenience of schools were undoubtedly a major selling factor it is apparent that the petitioners made a logical business determination and decided to provide the necessary schools on an appropriate schedule. The petitioners then advertised the schools as being convenient, "free" and without assessment and also adjusted the pricing of the homes. The quick sell-out of the development is witness to the wisdom of that determination.

With regard to the contentions concerning the Sewerage Authority, a similar situation existed. There was no exaction of anything from the petitioners without just compensation. In short, the Sewerage Authority simply would not permit the petitioners to damage the local environment by erecting a package sewerage plant which would discharge into a local stream and would not permit the installation of septic tanks on each of the 1664 tiny lots comprising the project. The Sewerage Authority instead insisted that other and more complete sewage disposal facilities be provided. Since the regional facilities of the Middlesex County Sewerage Authority were available nearby, the petitioners were directed to connect thereto.

No proof whatsoever was introduced at trial by petitioners that the exercise of discretion by the Sewerage Authority in these regards was other than reasonable. The Sewerage Authority next determined that it would be wise, because of anticipated future development, to expand the size of the line. It accordingly requested that petitioners do so and negotiated an allocation of the cost thereof. As a result, a contract was executed between the Sewerage Authority and petitioner allocating the estimated cost of $450,000 in the amount of $210,000 to the Sewerage Authority with the balance to the petitioners. In fact, the Sewerage Authority paid petitioners $231,000. Again, no proof whatsoever was introduced at trial to illustrate that this allocation was arbitrary or unreasonable.

Petitioners' bald statements of unconstitutional municipal action are without basis in the record. There is really nothing more presented by petitioners other than a simple quarrel with the factual conclusions made by the trial court. This does not constitute a reason of such character as would warrant the grant of a Writ of Certiorari. See U.S. Sup. Ct. Rule 19. The petition should therefore be denied.

Conclusion

For the reasons herein discussed, based upon the authorities cited, it is urged that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

HAROLD G. SMITH
Attorney for Respondents

Marc J. Gordon
Alfred J. Hill
Francis X. Journick,
Of Counsel to Respondents